OMEGA SECURITIES SDN BHD

v.

PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1214-1998]
25 NOVEMBER 1998

CIVIL PROCEDURE: *Want of prosecution - Striking out - Rules of the High Court 1980, O. 25 r. 1(4) - Failure to take out summons for directions - Inactivity of plaintiff - Whether an abuse of process of court - Whether abuse amounted to intentional and contumelious default - Whether such abuse per se a ground for striking out - Birkett v. James*

CIVIL PROCEDURE: *Want of prosecution - Striking out - Two limbs of Birkett v. James - Intentional and contumelious default - Inordinate and inexcusable delay occasioning serious prejudice or substantial risk of unfair trial - Whether there is a new third limb - Delay involving complete, total or wholesale disregard of rules of court amounting to abuse of process - Whether such abuse a ground for striking out per se - Whether still necessary to show prejudice or risk of unfair trial - Grovit v. Doctor - Choraria v. Sethia - Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin - Rules of the High Court 1980, O. 25 r. 1*

This was an application by the defendant to have the plaintiff's action dismissed for want of prosecution under O. 25 r. 1(4) of the Rules of the High Court 1980 ('the RHC'). The plaintiff had earlier filed a writ of summons for certain injunctive reliefs against the defendant. The defendant had then entered appearance and filed a statement of defence. Thereafter, the plaintiff did not take out a summons for directions under O. 25 r. 1(1) of the RHC but, instead, filed a summon-in-chambers for (and obtained) a restraining order against the defendant pending the disposal of the plaintiff's action.

Held:

[1] It is clear from *Birkett v. James* that disobedience to a pre-emptory order of the court is merely an example of a default that is intentional and contumelious; conduct amounting to an abuse of the process of the court is another example of such an intentional and contumelious default.

[1a] The conduct of the plaintiff in remaining docile and inactive after having obtained an injunction against the defendant, and in not proceeding to take out a summons for directions within the stipulated time, amounted to an abuse of the process of the court which, in turn, was tantamount to an intentional and contumelious default on its part.

[1b] To commence and to continue litigation which one has no intention to bring to conclusion can amount to an abuse of process. Where this is the situation, the party against whom the proceedings are brought is entitled to apply to have the action struck out. A plaintiff's inactivity may be relied upon as evidence to establish abuse of process; such evidence will also be capable of supporting an application to dismiss an action for want of prosecution.

[Application to strike out allowed.]

Cases referred to:
Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 ***(refd)***
Birkett v. James [1978] AC 297 ***(refd)***
Choraria v. Sethia (The Times Reports, 29 January 1998) ***(refd)***
Grovit & Ors v. Doctor & Ors [1997] 2 ALL ER 417 ***(foll)***
TM Feroze Khan & Ors v. Meera Hussain TM Mohd Mydin [1997] 4 CLJ 710 ***(refd)***
Toh Hock Thye v. Toh Chwee Biow [1981] 1 CLJ 87 ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***
Vasudevan v. T Damodaran & Anor [1981] 1 CLJ 84 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1(1), (4), (5)

For the plaintiff - Bernard Lawrence; M/s Sivananthan
For the defendant - Kumar Kanagasingam; M/s Allen & Gledhill

Reported by Gan Peng Chiang

JUDGMENT

Steve Shim J:

By summons-in-chambers dated 17 September 1998, the defendant has applied for an order that the plaintiff's action be dismissed for want of prosecution pursuant to O. 25 r. 1(4) of the Rules of the High Court (RHC). It is supported by the affidavit of Mohd Zulkafli bin Mohd Ali, a branch manager of the defendant. The plaintiff has opposed the application, filing the affidavit in reply of Abdul Halim bin Mohyddin, the appointed receiver and manager of the plaintiff.

At the outset, it is pertinent to look at the relevant provisions of O. 25 under which this application is made, in particular O. 25 r. 1(1), (4) and (5) thereof which stipulate as follows:

(1) With a view to providing, in every action to which this rule applies, an occasion for the consideration by the court of the preparations for the trial of the action, so that -

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditions and economical disposed thereof;

the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 (in these Rules referred to as a summons for directions) returnable in not less than 14 days.

(4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action.

(5) On application by a defendant to dismiss the action under paragraph (4), the court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

In *TM Feroze Khan & Ors v. Meera Hussain TM Mohd Mydin* [1997] 4 CLJ 710, Shaik Daud, JCA, had said that whether to grant or refuse an application to strike out or dismiss an action for want of prosecution was solely the discretion of the court and that an appellate court should not readily interfere with such a discretion. The principles to be applied in exercising such a discretion are firmly established by the Federal Court in *Vasudevan v. T Damodaran & Anor* [1981] 1 CLJ 84 citing with approval the English cases of *Birkett v. James* [1978] AC 297 and *Allen v. Sir Alfred Mc Alpine & Sons Ltd* [1968] 2 QB 229. Abdoolcader J (as he then was) (in delivering the judgment of the court) said *inter alia*:

> ... the power of the court to dismiss an action for want of prosecution should be exercised only when the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant ...

This statement of the law has been approved and followed in the subsequent Federal Court case of *Toh Hock Thye v. Toh Chwee Biow* [1981] 1 CLJ 87. It is perhaps interesting to note that in the very recent Court of Appeal case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* [1998] 4 CLJ 368, Mokhtar Sidin, JCA seems to have extended

the principles by adopting the current English position propounded by Nourse LJ in *Choraria v. Sethia* (The Times Reports, dated 29 January 1998 at p. 43) who said:

> The law, as it applied to this case could therefore be stated thus: although inordinate and inexcusable delay alone, however great, did not, amount to an abuse of process, delay which involved complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground.
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> That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v. James* or as one having independent existence appeared to be a point of no significance.

The learned judge in *Lee Boon Tin, supra,* held that if the principles followed by Nourse, LJ above were to be adopted, the court would find the respondent and his solicitors to have disregarded totally the time schedule given by the Rules without any excuse.

Be that as it may, I am of the view that the principles laid down by the Federal Court in *Vasudevan* and *Toh Hock Thye* must prevail. Those principles, emanating from the highest court in the land, will be brought to bear in this case. Here, the plaintiff had filed a writ of summons for certain injunctive reliefs against the defendant and the defendant had, after entering appearance, filed the statement of defence. Thereafter, the plaintiff took no action to file a summons for directions pursuant to O. 25 r. 1(1) RHC. Instead, the plaintiff applied by way of summons-in-chambers dated 30 April 1998 for a restraining order against the defendant pending the disposal of the plaintiff's action. That application was granted on 12 May 1998. It is not disputed that pleadings were deemed to have closed on or about 12 June 1998. Thereafter, as the plaintiff did not take out any summons for directions, the defendant decided to invoke O. 25 r. 1(4) by applying to have the plaintiff's action dismissed for want of prosecution.

It has been contended by counsel for the defendant that the plaintiff's conduct in having secured the benefit and use of the injunction and failing to take out a summons for directions within the stipulated time amounts to an abuse of the process of the court which constitutes an intentional and contumelious default on its part. In this connection, counsel relies on *TM Feroze Khan, supra,* in particular that part of the judgement of Shaik Daud, JCA, which states:

> Added to this is the fact that the appellants had obtained an injunction restraining the respondent from dealing with his own property and had also caveated the property. Having obtained the injunction and caveated the property, the appellants appear to be satisfied not to proceed to trial. From this, it can be inferred that the primary purpose of filing the writ appear to be a vehicle to obtain the injunction.

In rebuttal, counsel for the plaintiff submitted that in order to sustain the proposition that a default was intentional and contumelious, it must be positively shown that the plaintiff had ignored a pre-emptory order which the plaintiff had not done in the instant case. According to him, the plaintiff had not flouted or disobeyed any order relying apparently on the principles in *Birkett v. James, supra.* It is clear from *Birkett v. James* that disobedience to a pre-emptory order of the court is merely an example of a default being intentional and contumelious but it also goes on to state that conduct amounting to an abuse of the process of the court is another example of such an intentional and contumelious default. It is the latter example that the defendant hinges its case when it states, in effect, that the conduct of the plaintiff in remaining docile and inactive after having obtained an injunction against the defendant and by not proceeding to take out a summons for directions within the stipulated time, amounts to an abuse of the process of the court and therefore tantamounts to an intentional and contumelious default on its part. It is also the defendant's contention that despite being notified of the delay in filing the summons for directions, the plaintiff nevertheless proceeded to file an application for consolidation of the instant case with another case thereby aggravating the delay. In response, the plaintiff has maintained that the defendant knew fully well in advance of the plaintiff's intention to apply for consolidation and had not taken any action to oppose it. If the consolidation application were sought to justify the delay, then I think it had very little weight if any (see *TM Feroze Khan, supra*).

In summary therefore, having read the affidavits both in support of and in opposition to the application and having heard the submissions of learned counsels for the parties concerned, I am of the view that the conduct of the plaintiff amounted to an abuse of the process of the court, in consequence of which, there was an intentional and contumelious default on its part. This I so hold: In this connection, I adopt the sentiments expressed by Lord Woolf in *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417 when he said *inter alia*:

> The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought, is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts

> will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution ... once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial, the court was entitled to dismiss the proceedings.

On that note and in the premises, I will allow the defendant's application and order in terms thereof.